



Alabama Department of Environmental Management  
adem.alabama.gov

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May 2, 2008

CERTIFIED MAIL 7007 0710 0001 6204 0823  
RETURN RECEIPT REQUESTED

MR ADAM T BROWN  
DIRECTOR OF TECHNOLOGY & ENV AFFAIRS  
METALPLATE GALVANIZING LP  
PO BOX 966  
BIRMINGHAM AL 35201

RE: Final Consent Order No. 08-146-CWP  
Metalplate Galvanizing, L.P.  
Permit Nos. ALG12-0093 and ALG12-0094

Dear Mr. Brown:

Please find enclosed Consent Order No. 08-146-CWP which requires Metalplate Galvanizing, L.P. to take certain actions in regard to violations of the Alabama Water Pollution Control Act. This Consent Order has been issued with the consent of Metalplate Galvanizing, L.P. Please note that the assessed civil penalty is due within 45 days of the date of this letter.

If you have any questions, please contact Samantha Sims at (334) 394-4364.

Sincerely,

A handwritten signature in black ink that reads "James E. McIndoe".

James E. McIndoe, Chief  
Water Division

Enclosure

Copy to: Olivia Rowell - Office of General Counsel  
Samantha Sims, ADEM - Water Division (e-mail)  
James Carlson, ADEM, Water Division (e-mail)  
ADEM-Public Affairs Office (e-mail)  
US EPA Region IV

Birmingham Branch  
110 Vulcan Road  
Birmingham, AL 35209-4702  
(205) 942-6168  
(205) 941-1603 (Fax)

Decatur Branch  
2715 Sandlin Road, S.W.  
Decatur, AL 35603-1333  
(256) 353-1713  
(256) 340-9359 (Fax)



Mobile Branch  
2204 Perimeter Road  
Mobile, AL 36615-1131  
(251) 450-3400  
(251) 479-2593 (Fax)

Mobile - Coastal  
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Mobile, AL 36615-1421  
(251) 432-6533  
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**ALABAMA DEPARTMENT OF  
ENVIRONMENTAL MANAGEMENT**

IN THE MATTER OF: )

Metalplate Galvanizing, L.P. )  
PO Box 966 )  
Birmingham, AL 35201 )  
NPDES Permit ALG12-0093 )  
and ALG12-0094 )

CONSENT ORDER NO. 08-146-CWP

***PREAMBLE***

This Special Order by Consent is made and entered into by the Alabama Department of Environmental Management (hereinafter "the Department") and Metalplate Galvanizing, L.P. (hereinafter the "Permittee") pursuant to the provisions of the Alabama Environmental Management Act, Ala. Code §§ 22-22A-1 to 22-22A-16 (2006 Rplc. Vol.), the Alabama Water Pollution Control Act, Ala. Code §§ 22-22-1 to 22-22-14 (2006 Rplc. Vol.), and the regulations promulgated pursuant thereto, and § 402 of the Federal Water Pollution Control Act, 33 U.S.C. § 1342.

***STIPULATIONS***

1. The Permittee operates two metal finishing facilities located at 757 44<sup>th</sup> Street (hereinafter "Facility 1") and 1120 39<sup>th</sup> Street North (hereinafter "Facility 2"), both in the city of Birmingham, Jefferson County, Alabama.
2. The Department is a duly constituted department of the State of Alabama pursuant to Ala. Code §§ 22-22A-1 to 22-22A-16 (2006 Rplc. Vol.).

3. Pursuant to Ala. Code § 22-22A-4(n) (2006 Rplc. Vol.), the Department is the state agency responsible for the promulgation and enforcement of water pollution control regulations in accordance with the federal Water Pollution Control Act, 33 U.S.C. §§ 1251 to 1387. In addition, the Department is authorized to administer and enforce the provisions of the Alabama Water Pollution Control Act, Ala. Code §§ 22-22-1 to 22-22-14 (2006 Rplc. Vol.).

4. Ala. Code § 22-22-9(i)(3) (2006 Rplc. Vol.) and the ADEM Administrative Code of Regulations (hereinafter "ADEM Admin. Code r.") 335-6-6-.03 states that no person shall discharge pollutants into waters of the state without first having obtained a valid National Pollutant Discharge Elimination System (hereinafter "NPDES") Permit or coverage under a valid General NPDES permit.

5. On October 1, 2002, the Department issued the Permittee NPDES Permit Number ALG12-0093 (hereinafter "Permit 1") for Facility 1, which established limitations and/or monitoring requirements on the discharge of pollutants from such point sources into an Unnamed Tributary to Valley Creek. Also on October 1, 2002, the Department issued the Permittee NPDES Permit Number ALG12-0094 (hereinafter "Permit 2") for Facility 2, which established limitations and/or monitoring requirements on the discharge of pollutants from such point sources into Village Creek. Both Permit 1 and Permit 2 were reissued on October 1, 2007. Each Permit requires that the Permittee monitor its discharges and submit Discharge Monitoring Reports (hereinafter "DMRs") to the Department describing the results of the monitoring. The Permits also require that the Permittee maintain in good working order all systems used by the Permittee to achieve compliance with the terms and conditions of the Permits.

6. Without any admission of culpability or of any violation of the Permit or of law, the Permittee consents to abide by the terms of the following Order and to pay the civil penalty assessed herein.

7. The Department has agreed to the terms of this Consent Order in an effort to resolve the alleged violations cited herein without the unwarranted expenditure of State resources in further prosecuting the above alleged violations. The Department has determined that the terms contemplated in this Consent Order are in the best interests of the citizens of Alabama.

### ***CONTENTIONS***

8. The Department contends that the following discharges occurred from the Permittee's operations to a water of the state, which is not covered under the Permittee's existing General Permits, in violation of Ala. Code § 22-22-9(i)(3) (2006 Rplc. Vol.) and ADEM Admin. Code r. 335-6-6-.03. Permittee's contentions are identified below.

- On December 6, 2005, personnel at Facility 1 notified the Department of an unpermitted release of 200 gallons of 3% spent sulfuric acid. The spill was due to a coupling problem between a large storage tank and a transport truck. The release was not covered under Permit 1; therefore, the Department contends that Permittee violated Ala. Code § 22-22-9(i)(3) (2006 Rplc. Vol.) and ADEM Admin. Code r. 335-6-6-.03. A warning letter was issued to the Permittee on December 14, 2005, for this alleged violation. The Department notes that the Department has not assessed a civil penalty for this violation in this Consent Order. Permittee contends this release was not reportable, that Permittee reported



it out of an abundance of caution, and that no violation occurred.

Permittee further contends this event occurred more than two years ago and thus is not properly the subject of any action by the Department.

- On March 7, 2007, the Department was notified of discoloration in Village Creek. The Department contends that the discoloration was coming from the Permittee's location at Facility 2. Permittee contends that there is insufficient evidence to establish the source of the discoloration and that it did not come from the Facility.
- On May 23, 2007, the Department was again notified of discoloration in Village Creek. The Department determined that the discoloration was coming from the Permittee's location at Facility 2. The Department also observed approximately thirty dead minnows in Village Creek. Permittee contends there is insufficient evidence to establish the source of the discoloration and further contends that there is insufficient evidence to establish that the observed dead minnows were related to the Facility and further notes that Village Creek is a receiving water for many other dischargers.

9. The Permittee neither admits nor denies the Department's allegations cited herein, but contends strongly that Facility 1 should not be made a part of this Consent Order. However, in the spirit of cooperation, the Permittee consents to the terms and conditions of this Consent Order. The Department neither admits nor denies the Permittee's contentions.

10. Pursuant to Ala. Code § 22-22A-5(18)c. (2006 Rplc. Vol.), in determining the amount of any penalty, the Department must give consideration to the seriousness of the violation, including any irreparable harm to the environment and any threat to the health or safety of the public; the standard of care manifested by the Permittee; the economic benefit which delayed compliance may confer upon the Permittee; the nature, extent and degree of success of the Permittee's efforts to minimize or mitigate the effects of such violation upon the environment; the Permittee's history of previous violations; and the ability of the Permittee to pay such penalty. Any civil penalty assessed pursuant to this authority shall not be less than \$100.00 or exceed \$25,000.00 for each violation, provided however, that the total penalty assessed in an order issued by the Department shall not exceed \$250,000.00. Each day such violation continues shall constitute a separate violation. In arriving at this civil penalty, the Department has considered the following:

A. **SERIOUSNESS OF THE VIOLATION:** The violations consisted of the Permittee's alleged failure to properly implement Best Management Practices (hereinafter "BMP") to prevent unpermitted discharges at Facility 2. The Department contends that the alleged discharge that occurred on May 23, 2007, led to a minnow kill of approximately thirty minnows. Permittee contends there is insufficient evidence to establish the cause of the dead minnows.

B. **THE STANDARD OF CARE:** The Department contends that the Permittee failed to maintain in good working order all systems used to prevent unpermitted discharges into a water of the state; specifically, the Permittee failed to properly implement BMPs to prevent or minimize the potential for contaminated runoff.

C. ECONOMIC BENEFIT WHICH DELAYED COMPLIANCE MAY HAVE CONFERRED: The Department has been unable to ascertain if there has been a significant economic benefit conferred by the alleged violations. Permittee contends there was no economic benefit conferred.

D. EFFORTS TO MINIMIZE OR MITIGATE THE EFFECTS OF THE VIOLATION UPON THE ENVIRONMENT: The Department is not aware of any efforts made by the Permittee to minimize or mitigate the alleged effects of the violations upon the respective receiving streams.

E. HISTORY OF PREVIOUS VIOLATIONS: The Department contends the Permittee has had a history of previous violations. On December 6, 2005, the Permittee notified the Department of an unpermitted release of 200 gallons of 3% spent sulfuric acid at Facility 1. On July 18, 2005, a Notice of Violation was sent to the Permittee for observations made during a June 16, 2005, Compliance Evaluation Inspection for Facility 2. The observations included an alleged unpermitted discharge of storm water from process areas, alleged failure to properly implement a BMPs Plan, alleged failure to have a required signature on the BMPs Plan, and alleged failure to include an updated diagram of Facility 2 showing the locations where storm water exits at Facility 2. The Permittee contends that none of these alleged violations was subject to adjudication and does not admit to any previous violations.

F. THE ABILITY TO PAY: The Permittee has not alleged an inability to pay the civil penalty provided herein.

G. OTHER FACTORS: It should be noted that this Special Order by Consent is a negotiated settlement and, therefore, the Department has compromised the amount of



the penalty it believes is warranted in this matter in the spirit of cooperation and the desire to resolve this matter amicably, without incurring the unwarranted expense of litigation. By entering into this Consent Order the Permittee has likewise compromised its position that no penalty is warranted and that the other terms of this Consent Order are not legally required.

### ***ORDER***

THEREFORE, the Permittee, along with the Department, desires to resolve and settle the alleged compliance issues cited above. The Department has carefully considered the facts available to it and has considered the six penalty factors enumerated in Ala. Code § 22-22A-5(18)c. (2006 Rplc. Vol.), as well as the need for timely and effective enforcement, and the Department believes that the following conditions are appropriate to address the alleged violations cited herein. Therefore, the Department and the Permittee agree to enter into this ORDER with the following terms and conditions:

A. The Permittee agrees to pay to the Department a civil penalty in the amount of \$8,300.00 in settlement of the violations alleged herein within forty-five days from the effective date of this Consent Order. Failure to pay the civil penalty within forty-five days from the effective date may result in the Department filing a civil action in the Circuit Court of Montgomery County to recover the civil penalty.

B. The Permittee agrees that all penalties due pursuant to this Consent Order shall be made payable to the Alabama Department of Environmental Management by certified or cashier's check and shall be remitted to:

Office of General Counsel  
Alabama Department of Environmental Management  
P.O. Box 301463  
Montgomery, Alabama 36130-1463



C. The Permittee agrees to prepare and submit to the Department, not later than ninety days after the effective date of this Consent Order, an Engineering Report. The Engineering Report shall evaluate the existing operations and BMP Plan and should include an updated BMP Plan for both Permit 1 and Permit 2. The Engineering Report shall also include a schedule for implementation. At a minimum, the Permittee's Engineering Report shall address the following: the need for changes in maintenance and operating procedures, the need for modification of existing treatment works, and the need for new or additional treatment works. The Engineering Report shall be prepared by a professional engineer licensed to practice in the State of Alabama. The Department will provide written notification to the Permittee of acceptance of the Engineering Report or, if the Department determines through its review of the submitted Engineering Report that the submitted report is not sufficient to accomplish compliance with the Permit, the Department will provide comments, thereafter, the Permittee shall modify the Engineering Report so that it does accomplish compliance. Modifications to the Engineering Report, if required, shall be submitted to the Department no later than thirty days after receipt of the Department's comments. The Permittee agrees to complete implementation of the recommendations made in the Engineering Report within 180 days after the the date of the Department's written notification.

D. The Permittee agrees to submit a complete permit application for an Individual NPDES Permit for all discharges for both Facility 1 and Facility 2 as specified in ADEM Administrative Code Rule 335-6-6-.09 not later than ninety days after the effective date of this Consent Order.

E. The Permittee agrees to comply with the terms, limitations, and conditions of both Permit 1 and Permit 2, which were issued on October 1, 2007, each and every day hereafter until such time the General NPDES Permits are re-issued, and until such time the Individual NPDES Permits are issued for each Facility.

F. The Permittee agrees that, after the effective date of this Consent Order, for each day it fails to meet any of the milestone dates or satisfy any of the requirements set forth in or established by paragraphs A, C, and D contained herein, the stipulated civil penalties for failure to meet each milestone or any requirement date, except for Force Majeure acts as hereinafter defined as acts which occur beyond the Permittee's control, shall be as follows:

<u>Period of Noncompliance</u>	<u>Penalty per Day per Violation</u>
1st to 30th day	\$ 100.00
31st to 60th day	\$ 200.00
After 60 days	\$ 300.00

If the Permittee fails to meet any milestone or any assigned date ninety days after the required dates found in paragraphs A, C, and D then the Department reserves the right to file a new action against the Permittee.

G. Should violations continue to occur after 270 days after the effective date of this Consent Order, then the Department shall be free to issue additional orders or file suit against the Permittee in the Circuit Court of Montgomery County or another court of competent jurisdiction to enforce compliance of this Consent Order.

H. The Permittee agrees that payment of stipulated penalties due for violations of any milestone date under this Consent Order shall be due not later than the

28<sup>th</sup> day of the month following the monitoring period in which there were violations. Notification to the Permittee by the Department of the assessment of any stipulated penalty is not required.

I. The parties agree that this Consent Order shall apply to and be binding upon both parties, their directors, officers, and all persons or entities acting under or for them; such directors, officers and persons are bound solely in their corporate or governmental capacities and not in their individual capacities. Each signatory to this Consent Order certifies that he or she is fully authorized by the party he or she represents to enter into the terms and conditions of this Consent Order, to execute the Consent Order on behalf of the party represented, and to legally bind such party.

J. The parties agree that, subject to the terms of these presents and subject to provisions otherwise provided by statute, this Consent Order is intended to operate as a full resolution of the violations which are contended in this Consent Order.

K. The Permittee agrees that it is not relieved from any liability if it fails to comply with any provision of this Consent Order.

L. For purposes of this Consent Order only, the Permittee agrees that the Department may properly bring an action to compel compliance with the terms and conditions contained herein in the Circuit Court of Montgomery County. The Permittee also agrees that in any action brought by the Department to compel compliance with the terms of this Agreement, the Permittee shall be limited to the defenses of *Force Majeure*, compliance with this Agreement and physical impossibility. A *Force Majeure* is defined as any event arising from causes that are not foreseeable and are beyond the reasonable control of the Permittee, including its contractors and consultants, which could not be



overcome by due diligence (i.e., causes which could have been overcome or avoided by the exercise of due diligence will not be considered to have been beyond the reasonable control of the Permittee) and which delays or prevents performance by a date required by the Consent Order. Events such as unanticipated or increased costs of performance, changed economic circumstances, normal precipitation events, or failure to obtain federal, state, or local permits shall not constitute *Force Majeure*. Any request for a modification of a deadline must be accompanied by the reasons (including documentation) for each extension and the proposed extension time. This information shall be submitted to the Department a minimum of ten working days prior to the original anticipated completion date, or in the case of any request relating to an event occurring within such period, within two working days of the occurrence of the event. If the Department, after review of the extension request, finds the work was delayed because of conditions beyond the control and without the fault of the Permittee, the Department may extend the time as justified by the circumstances. The Department may also grant any other additional time extension as justified by the circumstances, but it is not obligated to do so.

M. The Department and the Permittee agree that the sole purpose of this Consent Order is to resolve and dispose of all allegations and contentions stated herein concerning the factual circumstances referenced herein. Should additional facts and circumstances be discovered in the future concerning the facility which would constitute possible violations not addressed in this Consent Order, then such future violations may be addressed in Orders as may be issued by the Director, litigation initiated by the Department, or such other enforcement action as may be appropriate, and the Permittee

shall not object to such future orders, litigation or enforcement action based on the issuance of this Consent Order if such future orders, litigation or other enforcement action address new matters not raised in this Consent Order.

N. The Department and the Permittee agree that this Consent Order shall be considered final and effective immediately upon signature of all parties. This Consent Order shall not be appealable and the Permittee does hereby waive any hearing on the terms and conditions of same. Nothing in this Consent Order shall deprive Permittee of all its rights in connection with the permit applications provided for in Paragraph D, including without limitation all rights of appeal concerning the Department's determinations regarding such permit applications.

O. The Department and the Permittee agree that this Consent Order shall not affect the Permittee's obligation to comply with any Federal, State, or local laws or regulations.

P. The Department and the Permittee agree that final approval and entry into this Consent Order are subject to the requirements that the Department give notice of proposed Orders to the public, and that the public have at least thirty days within which to comment on the Consent Order.

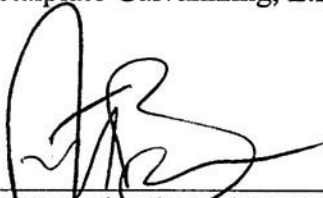
Q. The Department and the Permittee agree that, should any provision of this Consent Order be declared by a court of competent jurisdiction or the Environmental Management Commission to be inconsistent with Federal or State law and therefore unenforceable, the remaining provisions hereof shall remain in full force and effect.

R. The Department and the Permittee agree that any modifications of this Consent Order must be agreed to in writing signed by both parties.

S. The Department and the Permittee agree that, except as otherwise set forth herein, this Consent Order is not and shall not be interpreted to be a permit or modification of an existing permit under Federal, State or local law, and shall not be construed to waive or relieve the Facility of its obligations to comply in the future with any permit.

Executed in duplicate, with each part being an original.

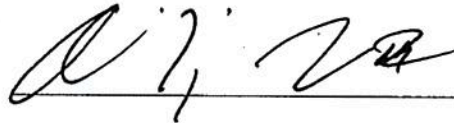
Metalplate Galvanizing, L.P.



(Signature of Authorized Representative)

Adam T. Brown  
(Printed Name)

Alabama Department of  
Environmental Management



Onis "Trey" Glenn, III

Director of Technical & Environmental  
(Printed Title)

Affairs

Director

Date May 2, 2008



John Kinney  
Legal Program Coordinator  
Black Warrior RIVERKEEPER®  
712 37<sup>th</sup> Street South  
Birmingham, AL 35222  
Phone: (205) 458-0095  
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March 5, 2008

James E. McIndoe  
Chief of the Water Division  
Alabama Department of Environmental Management  
P.O. Box 301463  
Montgomery, Alabama 36130-1463

Re: Proposed Consent Order to Metalplate Galvanizing

Dear Mr. McIndoe,

I am writing on behalf of Black Warrior Riverkeeper in response to your request for public comments regarding ADEM's proposed Consent Order to Metalplate Galvanizing (hereinafter "the Order" or "the Consent Order"). Unfortunately, we once again find ourselves in a position in which we feel it necessary to point out that ADEM has failed to adequately consider the six penalty factors pursuant to Ala. Code § 22-22A-5(18). We must also point out that ADEM's lethargy on this matter has led to years of unmitigated pollution, which ADEM no longer has the statutory authority to address.

When setting a civil penalty, Ala. Code § 22-22A-5(18) requires the Department to consider the following six penalty factors:

- 1) Seriousness of the violation
- 2) Standard of care manifested the Permittee
- 3) Economic benefit which delayed compliance may confer upon the Permittee

- 4) Nature, extent and degree of success of the Permittee's efforts to minimize or mitigate the effects of such violation upon the environment
- 5) The Permittee's history of previous violations
- 6) Ability of the Permittee to pay such penalty.

Although the Department has included a discussion of these penalty factors in the order, there does not appear to have been an in-depth evaluation of these factors and there is no indication of what weight was given to each factor or to the factors as a whole. The Department's statement that the factors were considered and the conclusions drawn appear to be merely boilerplate assertions. The Department has paid "lip service" to these factors in the Order, but in no way has the Department actually demonstrated that these factors were actually considered when determining the penalty provisions of the Order.

### **I. Seriousness of the Violation**

In its discussion of the "Seriousness of the Violation" (Contentions 10.A) the Order reads, "The violations consisted of the Permittee's alleged failure to properly implement Best Management Practices (hereinafter "BMP") to prevent unpermitted discharges at Facility 2. The Department contends that the alleged discharge that occurred on May 23, 2007, led to a minnow kill of approximately thirty minnows." These statements merely reiterate the violations without making a specific judgment as to the "seriousness" of those violations, and without determining what weight this factor was given in the determination of the penalty. We respectfully request clarification of ADEM's determination of the level of "seriousness" regarding an illegal discharge of polluted water significant enough to cause discoloration and to kill fish far downstream. The Order must also include a determination of what impact the seriousness of these violations had on the penalty amount.

## II. Standard of Care

The Order clearly demonstrates that the Permittee exercised a low standard of care. For example, the Order states “the Permittee failed to maintain in good working order all systems used to prevent unpermitted discharges into a water of the state; specifically, the Permittee failed to properly implement BMPs to prevent or minimize the potential for contaminated runoff.” Once again, the Department is simply using its “consideration” of this penalty factor as a forum for restating the facts, rather than making a meaningful determination as to whether or not the Permittee was careful to prevent pollution as a result of its activities. In this case, the Permittee was clearly negligent in failing “to properly implement BMPs to prevent or minimize the potential for contaminated runoff.” However, the Order fails to make this, or any other, actual conclusion regarding the standard of care manifested by the Permittee. The Order also fails to indicate what weight was given to this factor in determining the penalty amount. Both of these issues need to be directly addressed by the Order.

## III. Economic Benefit of Non-Compliance

The Order’s discussion of the “Economic Benefit which Delayed Compliance May Have Conferred” states, “The Department has been unable to ascertain if there has been a significant economic benefit conferred by the alleged violations.” This statement exemplifies the Department’s steadfast refusal to actually consider the penalty factors as it has been directed to by Ala. Code § 22-22A-5(18). The United States Environmental Protection Agency (EPA) states that “*every effort should be made to calculate and recover the economic benefit of noncompliance*” [EPA, Interim CWA Settlement Penalty Policy – March 1, 1995, page 4]. The objective is to place violators in the same financial position as they would have been if they had complied on time. Violators are likely to have obtained an economic benefit as a result of delayed or completely avoided pollution control expenditures during the period of non-compliance. Common delayed and avoided pollution control expenditures are capital equipment improvements or repairs, including engineering design, purchase, installation, and replacement, operation



and maintenance expenses (e.g. labor, power, chemicals) and other annual expenses, and one-time acquisitions (such as land purchase). ADEM, however, has not made any attempt to recover, or even calculate the benefit of noncompliance.

In many ways, the economic benefit of noncompliance is the most important penalty factor and should be controlling of the ultimate penalty. Once calculated, the monetary equivalent of the benefit of non-compliance should be the bare minimum penalty. If the penalty amount drops below this calculated figure, the Permittee actually has an incentive to continue polluting as it is less expensive for the company to accept ADEM's penalties than to implement proper pollution control measures. This is exactly the case in the terms of the Metalplate Galvanizing Consent Order. The paltry \$8,300 fine is far below the actual value of the economic benefit received by the Permittee by refusing to implement proper BMPs. In fact, data collected by the Storm Water Management Authority (provided to ADEM in 2005) shows that Metalplate Galvanizing's Facility 2 often discharges water with metal concentrations in the hundreds of milligrams per liter. Water of this quality would need to be processed in a treatment works before being discharged to waters of the state in order to be protective of water quality standards. Therefore, the money Metalplate saved by not building a treatment plant to clean up these discharges is an economic benefit incurred by the company that far exceeds the outrageously low \$8,300 penalty set by this Consent Order. ADEM must reconsider this penalty factor giving due consideration to the actual money Metalplate has saved by not implementing pollution control measures.

#### **IV. Other Factors**

With regards to the remaining three penalty factors, the Permittee's efforts to minimize or mitigate the effects upon the environment, history of previous violations, and ability to pay, ADEM seems to have adequately evaluated the circumstances. However, ADEM has again failed to indicate the effect that these circumstances actually had on the penalty amount. The inclusion of the discussion of the penalty factors is meaningless without a statement of how each factor affected the ultimate penalty.

Under the heading “Other Factors,” the Order reads, “The Department has compromised the amount of the penalty it believes is warranted in this matter in the spirit of cooperation and the desire to resolve this matter amicably, without incurring the unwarranted expense of litigation.” Has the Department forgotten that it is a *regulatory* agency with the authority to impose the penalties that are necessary to ensure the protection of the environment? It is not ADEM’s business to be amicable with consistent, negligent polluters. Rather than being amicable, the Department needs to be more authoritative and take the necessary action to stop the polluted discharges from Metalplate’s facilities.

Finally, we must ask the question, “Why has ADEM taken so long to address the situation at Metalplate Galvanizing?” In reviewing ADEM’s files on the Metalplate facilities, we have become aware that the Storm Water Management Authority (SWMA) has been collecting data on Metalplate’s discharges at least since 1999 and made Director Trey Glenn aware of the problem in June of 2005. Just to provide a few examples, data submitted to ADEM by SWMA contained all of the following information on discharges from Metalplate:

4/28/05 – TSS = 1,220 mg/L; Iron = 1,162 mg/L

4/28/05 – Oil and Grease = 684 mg/L; TPH = 1,525 mg/L; Iron = 984 mg/L; Zinc = 786 mg/L

10/24/02 – Ammonia = 1,436 mg/L; Iron = 652 mg/L; Zinc = 680 mg/L; Lead = 2.83 mg/L

7/27/99 – Zinc = 863 mg/L

These staggering numbers indicate a history of extremely serious problems at the facility. However, we believe ADEM did not take this situation seriously enough as indicated by its failure to take measures to address the problem until now, almost three years after the Department was made aware of the problem. This is not a new issue. In fact, pollution from Metalplate’s discharge turning the receiving stream bright orange is even visible in the Google Earth image of the facility. *How can the Department justify allowing such a significant source of pollution to continue for so long, and how do you intend to prevent such administrative failures in the future?*

We appreciate your attention to this matter and look forward to the Department's response to these comments.

For the River

John Kinney  
Program Director  
Black Warrior Riverkeeper





Alabama Department of Environmental Management  
adem.alabama.gov

1400 Coliseum Blvd. 36110-2059 ♦ Post Office Box 301463  
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BOB RILEY  
GOVERNOR

May 2, 2008

Mr. John Kinney, Legal Program Coordinator  
Black Warrior Riverkeeper  
712 37<sup>th</sup> Street South  
Birmingham, Alabama 35222

RE: Response to Comments on Proposed Consent Order  
Metalplate Galvanizing, L.P.  
General NPDES Permit Numbers ALG12-0093 and ALG12-0094

Dear Mr. Kinney:

The following is provided in response to your comments dated March 5, 2008, regarding a proposed Consent Order (CO) for Metalplate Galvanizing, L.P.:

**Comment:** Code of Alabama, 1975, § 22-22A-5(18) requires the Department to consider six penalty factors whenever setting a civil penalty. Although the Department has included a discussion of these penalty factors in the Order, there does not appear to have been an in depth evaluation of these factors and there is no indication of what weight was given to each factor or to the factors as a whole.

**Response:** The Department has considered the six statutory penalty factors in depth to the extent that information relevant to those factors is available to the Department. The statute does not require that the Department discuss the weight given to each factor or the factors as a whole. The statute merely requires that Orders include the findings of fact relied upon by the Department in determining the amount of the civil penalty. The Order in question contains such findings of fact.

**Comment:** In its discussion of the "Seriousness of the Violation" (Contentions 10.A), the statements merely reiterate the violations without making a specific judgment as to the "seriousness" of those violations, and without determining what weight this factor was given in the determination of the penalty. We respectfully request clarification of ADEM's determination of the level of "seriousness" regarding an illegal discharge of polluted water significant enough to cause discoloration and to kill fish far downstream. The Order must also include a determination of what impact the seriousness of these violations had on the penalty amount.

**Response:** Provision § 22-22A-5(18) c. requires that consideration "be given to the seriousness of the violation, including any irreparable harm to the environment and any threat to the health and safety of the public." The Department considered those factors. The statute does not require the Department to discuss the weight given to each factor or the factors as a whole. The statute merely requires that Orders include the findings of fact relied upon by the Department in determining the amount of the civil penalty. The Order in question contains such findings of fact.

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**Comment:** In the discussion of the "Standard of Care," the Department is simply using its "consideration" of this penalty factor as a forum for restating the facts, rather than making a meaningful determination as to whether or not the Permittee was careful to prevent pollution as a result of its activities. In this case, the Permittee was clearly negligent in failing "to properly implement BMPs to prevent or minimize the potential for contaminated runoff." However, the Order fails to make this, or any other, actual conclusion regarding the standard of care manifested by the Permittee. The Order also fails to indicate what weight was given to this factor in determining the penalty amount. Both of these issues need to be directly addressed by the Order.

**Response:** The Department disagrees with the commenter's interpretation of the Environmental Management Act. The Act requires the Department to include in the Order the findings of fact relied upon in determining the amount of the civil penalty; it does not require the Department to include conclusions in the Order. The language suggested by the commenter is a conclusion and not a finding of fact. The Department also disagrees with the commenter's understanding of "standard of care." The Department believes the commenter has confused "standard of care" with standards of liability.

**Comment:** The Order's discussion of the "Economic Benefit which Delayed Compliance May Have Conferred" states, "The Department has been unable to ascertain if there has been a significant economic benefit conferred by the alleged violations." This statement exemplifies the Department's steadfast refusal to actually consider the penalty factors as it has been directed to by Ala. Code § 22-22A-5(18).

**Response:** As noted in the Order, the Department has not been able to determine that any significant economic benefit accrued to the violator as a result of noncompliance, but the Department did consider the avoided costs mentioned. Such consideration is all that is required by the statute.

**Comment:** With regards to the remaining three penalty factors, the Permittee's efforts to minimize or mitigate the effects upon the environment, history of previous violations and ability to pay, ADEM seems to have adequately evaluated the circumstances. However, ADEM has again failed to indicate the effect that these circumstances actually had on the penalty amount. The inclusion of the discussion of the penalty factors is meaningless without a statement of how each factor affected the ultimate penalty.

**Response:** ADEM believes that the penalty is adequate based upon its consideration of all penalty factors. Also, as noted above, § 22-22A-5(18)c does not require that the Department discuss the weight given to each factor or the factors as a whole. The statute merely requires that Orders include the findings of fact relied upon by the Department in determining the amount of the civil penalty.

**Comment:** Finally, we must ask the question, "Why has ADEM taken so long to address the situation at Metalplate Galvanizing?" In reviewing ADEM's files on the Metalplate facilities, we have become aware that the Storm Water Management Authority (SWMA) has been collecting data on Metalplate's discharges at least since 1999 and made Director Trey Glenn aware of the problem in June of 2005. How can the Department justify allowing such a significant source of pollution to continue for so long, and how do you intend to prevent such administrative failures in the future?

**Response:** As noted above, the Storm Water Management Authority (SWMA) made Director Trey Glenn aware of the situation at Metalplate Galvanizing on June 8, 2005. Subsequently, ADEM conducted an inspection on June 16, 2005. A Notice of Violation was issued to the facility on July 18, 2005 as a result of the inspection. On April 11, 2006, the Department conducted a second inspection in order to evaluate the potential for groundwater impacts. These investigations were necessary to support this enforcement action.

Thank you for your careful review of the draft Order and the comments submitted. However, at this time, the Department believes that the provisions in the Order are appropriate for addressing the cited violations.

Should you have additional questions or concerns, please contact me at (334) 271-7974.

Sincerely,

A handwritten signature in black ink, appearing to read "Vernon H. Crockett". The signature is written in a cursive, flowing style.

Vernon H. Crockett, Chief  
NPDES Enforcement Branch  
Water Division



